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OPPOSITION BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958

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No. 542

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ELLSWORTH MEDBERRY, Petitioner,

vs.

WAYNE K. PATTERSON, Warden, Colorado State Reformatory, and HARRY C. TINSLEY, Warden, Colorado State Penitentiary,

Respondents.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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# BRIEF OF RESPONDENTS

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## STATEMENT OF THE CASE

In 1939, petitioner was convicted of murder in the first degree in the District Court in and for Washington County, Colorado. Review of this conviction was obtained in the Colorado Supreme Court, which resulted in affirmance.

Medberry v. People, 107 Colo. 15, 108 P.(2d) 243. No writ of certiorari was sought in this court and no proceedings have been instituted in the trial court since the original trial. In 1958, petitioner submitted a petition for a writ of habeas corpus to the Colorado Supreme Court, which was denied without written opinion on September 18, 1958. Rehearing was also denied without written opinion on October 14, 1958. Certiorari is now sought to review that judgment.

After the trial in the state court, counsel retained by petitioner to represent him presented a motion for a new trial, which was denied. Petitioner was then sentenced on July 31, 1939. In October, 1939, an attorney from Wisconsin entered his appearance for the petitioner and was granted leave to so appear. At the same time, the Colorado attorneys retained by petitioner were granted leave to withdraw. The Wisconsin attorney then asked the trial court, inter alia, for free Colorado counsel and a free transcript, asserting indigency of petitioner. These requests were denied. In its opinion, the Colorado Supreme Court states:

> "Thereafter, upon the suggestion of the indigency of defendant, we permitted him to docket his proceeding in error in this court without payment of the fee therefor and to submit the case on typewritten abstract and briefs."

## SUMMARY OF ARGUMENT

No special or important reason for the granting of certiorari is presented in that it is not shown that a federal question of substance was decided, nor that the decision has not been decided by this court or is contrary to this court's decisions.

## ARGUMENT

Rule 19.1(a), Revised Rules of the Supreme Court of the United States, provides as follows:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

In effect, petitioner is now asking this court to review questions decided by the Supreme Court of Colorado in 1940, contrary to the rules of this court and the statutes. Revised Rule 22, Title 28 U.S.C.A., §350, 1940 ed. The sole decision before this court for review at this time is the denial by the Colorado Supreme Court of an application for a writ of habeas corpus. The denial was

without written opinion. Article VI, Section 3, Colorado Constitution, vests discretionary power in the Supreme Court of Colorado to entertain original applications for writs of habeas corpus. 65-1-1, 1953 Colorado Revised Statutes, vests jurisdiction in the various district courts of the state in habeas corpus proceedings. The decision of the Supreme Court in the instant case merely means that the majority of the court did not think that the court's original jurisdiction should be invoked. The decision in meaning is analogous to a denial of a petition for a writ of certiorari by this court. State of Maryland v. Baltimore Radio Show, 70 S. Ct. 252, 338 U.S. 912, 94 L. Ed. 562. The decision is not based on a substantial federal ground, but is one of administration of the Colorado courts. Moreover, in the absence of a written opinion, it cannot be said that the decision did not rest on an adequate non-federal ground. Phyle v. Duffy, 68 S. Ct. 658, 334 U.S. 431, 92 L. Ed. 1494; rehearing denied 68 S. Ct. 1526, 334 U.S. 862, 92 L. Ed. 1782.

We have pointed out in the statement of the case the rulings of the trial court and the Colorado Supreme Court as they relate to the question of indigency. The Supreme Court of Colorado, in its opinion in 1940, further noted that at all times the defendant (petitioner here) had been represented by counsel of his own choosing. This statement is applicable now. There is, thus, to say the least, grave doubt as to the indigency of petitioner at the time of the proceedings in 1939 and 1940. As a matter of fact, based on the rulings of the trial court denying a free transcript and free counsel, if any

assumption is to be made, it must be that the trial court found defendant not indigent. If no assumption is to be made from the rulings, then there must be a finding of fact as to indigency, which the Colorado Supreme Court deemed advisable to leave to the state district court. In Griffin v. Illinois, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891, and Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U.S. 214, 78 S. Ct. 1061, 2 L. Ed. (2d) 1269, cite by petitioner, the indigency of petitioners was conceded. So, too, was the availability of a transcript of the original proceedings. In the instant case, such concessions are not made and the above cited cases are distinguishable.

## CONCLUSION

The Supreme Court of Colorado did not decide a federal question in refusing to invoke its original jurisdiction in an habeas corpus action where facts were in dispute and another state court was available in which the facts could be determined. The writ of certiorari should be denied.

Respectfully submitted,

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